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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 75

FRANK LEE, As Commissioner of Corrections of Alabama; JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, As Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, As Warden of the City Jail of Birmingham, Alabama,

APPELLANTS

—vs—

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as Mother and Next Friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as Mother and Next Friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

SUPPLEMENTAL BRIEF OF APPELLANTS AFTER ARGUMENT

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Birmingham, Alabama, Appellant

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SUPPLEMENTAL BRIEF

This Supplemental Brief After Argument is filed under special leave of this Court heretofore granted on December 4, 1967.

POINT I

In the oral argument on behalf of the appellees, their attorney referred to the attitude of the present State administration with regard to segregation and argued that if discretion were left with the appellants, the end result would be the maintenance of segregation because appellant Lee was but an appointee of the Governor of Alabama and "you cannot in fact expect him to exercise his discretion and do his duty without a court order."

This argument must have been based upon a misunderstanding of the State law under which the Board of Corrections was created and operates because its chief premise, that the Commissioner and Board serve at the pleasure of the Governor, is incorrect.

The Board of Corrections of Alabama, the members of which are appellants in this cause, is created and provided for by Sections 10 (1) and 10 (2), Title 45, Code of Alabama 1940, Recompiled 1958. Its five members are appointed for staggered ten year terms by the Governor with the advice and consent of the State Senate; these members can be removed only by impeachment. Vacancies are filled by appointment by the Governor from a list of three nominees selected by the Chief Justice of the Supreme Court, the Presiding Judge of the Court of Appeals and the Lieutenant Governor. Title 45, Section 10 (2) Code of Alabama 1940, Recompiled 1958.

Title 45, Sec. 10 (1), which creates the Board of Corrections, is as follows:

"Creation and powers, etc., of board.—There is hereby created the board of corrections of Alabama, hereinafter

referred to as 'the board'. The board shall have all of the rights, powers, duties and authority now conferred upon the department of corrections and institutions and the director of corrections and institutions by Title 45, Code of Alabama 1940, as amended, and all other laws of this state. *The board shall also have all of the rights, powers, duties and authority conferred upon the governor by chapter 1 and 2 of Title 45, Code of Alabama 1940.* All such rights, powers, duties and authority are hereby transferred to the board, together with all funds, property, books, records and effects of the department of corrections and institutions and the director of corrections and institutions." (Emphasis added).

Under the provisions of Title 45, Section 10 (5), Code of Alabama, 1940, Recompiled 1958, the Board appoints the Commissioner of Corrections who is responsible only to the Board, not the Governor, and who serves at its pleasure. That statute reads as follows:

"Commissioner of corrections and deputies.—The board shall appoint a commissioner of corrections who shall serve at the pleasure of the board and shall be responsible to it. He shall be the chief administrative officer of the board and the board may delegate any of its administrative powers and authority to him. The commissioner of corrections shall be a man of good character, of good business experience and experience in the administration of correctional system. He shall have no financial interest in any partnership, corporation, or association with which the board has any financial dealings. The commissioner of corrections, with the approval of the board, shall have the authority to appoint deputy commissioners, not to exceed two, and to

define their duties. Their salaries shall each be an annual amount fixed at $1,500 less than the salary of the commissioner of corrections."

An examination of the officials of Alabama as listed in Acts of Alabama 1959, at page 1600; 1961, at page 1640; 1963, at page 1293; and 1965, at page 1671; shows that appellant Lee has served as Commissioner of Corrections under three separate State administrations. In addition, of the members of the Board, appellant Britton was appointed by Governor Persons in 1953; appellant Cashion was appointed by Governor Persons in 1953; appellant Mitch was appointed by Governor Folsom in 1956; appellant Luttrell, was appointed by Governor Folsom in 1957; and appellant McLaughlin was appointed by Governor George Wallace in 1964. Thus it is clear that the appellant Board is truly an independent one; indeed, it is reputed to be one of the most independent prison boards in the United States.

The attitude and intentions of the prison administrative authority are reflected by the affidavit of Commissioner Lee which was made a part of the Application For Stay and appears as Appendix "C" at page 47 of the "Brief for Appellants" and in his testimony appearing on pages 159 through 185 of the record. Consequently, there is no justification for any apprehension that honest discretion would not be exercised.

It has been said that hard cases make bad law. It would be a tragedy if this Court left unmodified the strict and rigid order of the lower court by incorrectly assuming that this case is harder than it truly is, i.e., if this Court felt that sensible and reasonable discretion could not be exercised by the prison authorities of Alabama.

POINT II

During the course of oral argument the Chief Justice inquired if it were not necessary for the Court to order total and complete prison integration to prevent the maintenance of a defacto system of segregation through the practice of Alabama trial judges in sentencing prisoners to specific prisons according to their race. The answer is no because there is no such practice in Alabama and none is permitted by Alabama law.

The sentencing procedures are definitely settled and prescribed by Alabama law; the trial judges do not sentence prisoners to a specific prison. The sentence of the trial court simply states that the defendant is sentenced to "the penitentiary" for a specified term of years, etc.

Title 15, Section 328, Code of Alabama 1940, Recompiled 1958, authorizes the trial court to impose the "term" of imprisonment in the penitentiary, except in cases where this power is expressly conferred on the jury.

Neither the trial judge nor the jury selects or names a particular prison to which a convict is to be sent.

Title 15, Section 325, Code of Alabama 1940, Recompiled 1958, provides:

> "The only legal punishments, besides removal from office and disqualification to hold office, are fines, hard labor for the county, imprisonment in the county jail, *imprisonment in the penitentiary,* which includes hard labor for the State, and death by electrocution." (Emphasis supplied).

It is beyond the power and authority of the trial court to specify the institution wherein the prisoner is to serve his

sentence. Any such direction by the trial judge would be mere surplusage and without legal effect.

Once a prisoner is sentenced to "the penitentiary" he comes under the jurisdiction of the Board of Corrections of Alabama and the authority of the Commissioner of Corrections for commitment to a specific place of confinement. The convicts are assigned to particular prisons, and to particular cells in each prison, by and under the authority of the appellant members of the Board of Corrections of Alabama and the appellant Commissioner of Corrections of Alabama. Only the Board of Corrections has the power to specify the particular institution to which the convict is committed and it acts through its Commissioner of Corrections. Title 45, Section 3, et seq., Code of Alabama 1940, Recompiled 1958.

Title 45, Section 26, Code of Alabama 1940, Recompiled 1958, provides as follows:

> "Temporary confinements of convict pending removal. —When any convict is sentenced to the penitentiary, the judge of the court in which the sentence is had shall order such convict to be confined in the nearest secure jail; and the clerk of the court shall at once notify the director as to the jail where such convict is confined, and forward to him a copy of the judgment entry and sentence in the case, and inform him if any special care be necessary to guard such convict; and thereupon the director shall direct where such convict shall be taken for confinement or hard labor."

Of course, the powers of the director are now exercised by the Board of Corrections. Title 45, Sections 10(1), 10(5) and 10(8), Code of Alabama, 1940, Recompiled 1958.

It results, therefore, that a defendant, regardless of race, having been convicted, is sentenced to "the penitentiary" by the trial court. The Board of Corrections, acting through its Commissioner, then classifies and assigns the prisoner to one of the penal institutions in Alabama. This latter is not a function of the court. The Chief Justice's concern, though understandable, was unnecessary.

POINT III

In the oral argument before the Court appellants referred to two cases not cited previously in the printed briefs furnished the court.

The opinion by *Ray v. Pennsylvania*, 263 Fed. Supp. 630, was referred to by appellants, not because of any binding precedent but because the opinion of the District Court trial judge cogently summarized reasons for leaving a wide latitude of discretion in the prison authorities in handling racial matters.

Reference was also made to the case of *Alfred Earl Toles v. Hon. Nicholas Katzenbach, acting Attorney General of the United States et. al.*, case #21,268 decided by the United States Court of Appeals for the Ninth Circuit, September 27, 1967, and reported in part in 36 Law Week 2235. Photocopies of the full decision were hand delivered to the Justices. At the time of the preparation of this brief the citation in the Federal Reporter is not yet available.

Mr. Justice White in effect asked if our appeal should fall if the Ninth Circuit Court was wrong in the Toles case. The answer is no because the Toles case raises only one factual situation and is simply one illustration of an administrative

decision made within the discretionary authority of prison officials. This Court might view that particular factual situation as requiring a different decision in the exercise of reasonable discretion. The Toles case is an illustration of the situations which may develop requiring the exercise of judgment and discretion on the part of prison officials. The Toles case adds weight to our contention that prison officials should retain ample power to administer prison affairs to effectively deal with racially tense situations. We seek to be relieved of the rigidity of the lower court's order and its requirements for making periodic reports, particularly in areas where the Commissioner of Corrections has no authority to require individual jailers to report to him.

POINT IV

The question was asked by the Court, probably through Mr. Justice Fortas, as to a citation in the record showing that appellant Robert K. Austin, as warden of the city jail of Birmingham, Alabama, was or was not representative of all of the other wardens and jailers of the cities and towns of Alabama. First, there is absolutely no evidence, self-serving or otherwise, tending to prove such representative capacity. The only evidence negates such a contention. See the record at page 179: Question (to defendant A. Frank Lee) "Then you would—in your opinion, would you say, in your opinion, there is a substantial difference between the smaller town jails in Alabama and the city jails and the Birmingham City Jails and facilities, supervision, and the type of—and the —the type of control between—between these?" Answer: "Yes Sir."

It is not necessary that defendant Austin be found as a representative of "the class" to rule on the constitutionality of the State's statutes which on their face require complete

and permanent segregation of the races in all the Alabama prison facilities. The constitutionality of those statutes is clearly before the Court without resort to a decree against the defendant Austin as warden of the city jail of Birmingham, Alabama, "as representative of that class including all other wardens and jailers of cities and towns of Alabama," or expressed differently, it is not necessary to resort to this strained construction of a class representative to contest the constitutionality of the statutes involved.

POINT V

A number of questions were asked by the members of the Court during oral argument and from those questions it appeared that some members of the Court felt that perhaps the objections of the appellants to parts of the order of the District Court could be removed by delay, or by the mere passage of time, and therefore, the idea was expressed that appellants should have applied to the District Court for more time. This confusion of objectives probably resulted in part from the appellants' representation that new, modern and completely desegregated prison facilities would be completed by June, 1969, and that when these new facilities are available, complete desegregation will be facilitated. That argument was directed to only one aspect of the problem of our state prison officials created by the lower court order.

Arbitrary racial segregation would end if this Court affirmed the declaration of the unconstitutionality of the State statutes requiring it. Prison authorities would begin to integrate the prisons as fast as possible as a matter of policy. This policy would be aided by the opening of the new facilities, and not initiated by it. Indeed, substantial progress has already been made even though the lower court's order was stayed.

If arbitrary racial segregation were all that was covered by the District Court order, an extension of time for compliance with the order might be sufficient; however, the District Court, except in a very narrow area, forbade all segregation including such as would result from the exercise of reasonable discretion—which discretion is absolutely essential to prison operation, and is frequently necessary to head off dangerously threatening situations.

In other words, an extension of time alone would not make the District Court's order acceptable. The basic error of unduly restricting freedom of action would remain. We urge the Supreme Court to modify the District Court's order to permit the reasonable exercise of discretion by prison authorities, even though the exercise of discretion may sometimes result in some separation of the races. With the State statutes requiring arbitrary segregation declared unconstitutional, the Alabama prison system would be no different from the Federal prison system or other state prison systems. Prison authorities everywhere should be left with sufficient discretion and inherent authority to face varying situations as they arise without a rigid statute requiring arbitrary segregation or an equally objectionable rigid court order requiring arbitrary integration.

POINT VI

We must face the fact that many prisoners have unreasonable and hardened prejudices; it behooves all concerned to take that into consideration when dealing with them. Those existing prejudices require consideration in at least two aspects; one, they present a source of danger to inmates; and, another, they indicate a feeling on the part of some prisoners that they are being imposed upon when placed with prisoners

of another race and that the imposition is added punishment not required by their sentence and constitutes cruel and unusual punishment. Perhaps such an emotional attitude is unreasonable; but if it exists, to ignore it could be a serious (and perhaps an unnecessary) source of friction and trouble.

This Court is moving in an uncharted sea with no legal precedent and without a sufficient accumulation of factual situations and developments to guide it. Therefore, common sense and good judgment must be its polestar. Inconceivable harm may result from an injudicious decision in this case. It is our contention that the trial court went too far and too fast. Let it not be said with justification that the Federal judges rush in where angels fear to tread.

Since our argument does not depend on statutes and established law as much as reasoning, the following editorials are called to the attention of the Court for the light they may throw on the problem. These editorials appeared in the Montgomery Advertiser* over the last year.

THE MONTGOMERY ADVERTISER
WEDNESDAY, DECEMBER 14, 1966

Stone Walls Do Not A Prison Make

ASIDE FROM a strict interpretation of the law, which is probably accurate, it is hard to understand what democratic

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* The Advertiser is a widely recognized newspaper of national repute, noted for its editorial shafts directed at many activities of the Wallace administrations, including those related to the school desegregation case recently decided by this Court, wherein the editorials correctly predicted the consequences of the position taken by the State.

principle is served by the federal court order desegregating all Alabama prisons and jails — state, county and city.

Prisoners have rights of course, but this does seem to stretch the point. Worse, it subjects already understaffed prisons and jails to a serious disciplinary problem which may arise between white and Negro prisoners forced into close association.

In general, those who find themselves behind bars are not notably interested in brotherhood and take a dim view of those of the opposite race. It's easy enough for the court to say, by implication, that it is the duty of the jailors to prevent inmates from killing each other for reasons of racial unenlightenment, but the woeful shortage of competent guards mocks this nicety.

The "right" of prisoners to mingle with those of another race is pretty far-fetched, when segregation by age, conduct, criminal record and, of course, sex is continued. The world behind bars is hardly a microcosm of democratic Utopia; any attempt to make it appear so is a bit ludicrous, whatever the law says.

Presumably, wardens will still be free to separate trouble-makers, even if race is the basis of the trouble, but they may be forced to permit one act of violence first by way of proof.

The whole thing strikes us as passing silly.

If and when the court is called on to order the placement of voting machines in prisons and jails, for those whose rights of citizenship have not been revoked, let there be no gerrymandering by cell blocks.

THE MONTGOMERY ADVERTISER
WEDNESDAY, MAY 31, 1967

Stone Walls Do Not A Prison Make (Cont.)

WHEN A FEDERAL COURT ruled that segregation by race in Alabama jails and prisons was unconstitutional, we hooted that this was reducing the doctrine of civil liberties to the absurd. We still think so and hope the U.S. Supreme Court, which has agreed to review the case, will agree.

The argument by appellants for the state is that prisoners lose the right to select their associates in prison. If this is not the case, if states cannot separate prisoners by any factor they chose (sic) might not another guardhouse lawyer question segregation by type of offender or even by sex?

When a man is imprisoned he loses his freedom of movement and, by logical extension, his social freedoms. Even if this (sic) held as technically violative of a prisoner's rights, the overriding consideration should be the maintenance of order.

Men behind bars are there, in general, because of antisocial behavior. They are not the best candidates for enforced brotherhood even among members of their own race. The tensions of confinement produce burning animosities. Integration of prisoners would increase this incalculably with no conceivable service to prisoners or society.

The added cost of maintaining discipline—a euphemism for preventing fights and killings—would be greater than the state should reasonably be expected to bear.

In a word, it's just plain silly. Prisoners, by and large, are not very egalitarian minded. *If one hates red heads, he should be segregated from red heads, or they from him. If he resents forced association with those of another race — as most prisoners probably do — it is hard to believe how either group would benefit or how their rehabilitation would be served thereby.*

Whatever the courts say, racial feelings—which work both ways—are a significant problem in prison discipline. Theoretical law will not change this, unless for the worse. (Emphasis supplied).

THE MONTGOMERY ADVERTISER
TUESDAY, JULY 18, 1967

Brotherhood Behind Bars Failed Horribly

THE TRAGIC DEATHS of 37 prisoners in a Florida prison camp Sunday night is grisly evidence of what we were talking about in criticising the federal court order requiring the desegregation of Alabama jails and prisons.

The 37 Florida convicts died in a fire started during a brawl between white and Negro prisoners, who had been fighting since the camp was integrated last week.

We noted May 31:

"When a man is imprisoned he loses his freedom of movement and, by logical extension, his social freedoms. Even if this is held as technically violative of a prisoner's rights, the overriding consideration should be the maintenance of order.

"Men behind bars are there, in general, because of anti-social behavior. They are not the best candidates for enforced brotherhood even among members of their own race. The tensions of confinement produce burning animosities.. Integration of prisoners would increase this incalculably with no conceivable service to prisoners or society . . ."

Racial feelings are a significant problem in prison discipline. Nothing can alter this fact. The Florida tragedy stands as hideous evidence that a prison is a poor place for experimenting with togetherness by force. We hope the U.S. Supreme Court, which is scheduled to review the Alabama case in the fall, will exercise some common sense.

CONCLUSION

It is respectfully requested that the decision of this Court go no further than to affirm that part of the order, decree and judgement of the court below which held the named statutes invalid and that that part of the order be reversed which places any mandatory requirements upon the appellants to make reports to the court or otherwise subject their administrative acts to routine review.

We earnestly contend that full freedom should be allowed the wardens, jailers and prison administrators of Alabama to maintain prison discipline and security in their prisons without a minute routine review by a Federal court. Prison administrative officials who are charged with maintaining law and order in a prison should be accorded sufficient latitude to permit them to do so. To do otherwise will unnecessarily expose our prisons to riots and other disorders.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nicholas S. Hare, one of the attorneys for the said appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of December, 1967, I served copies of the foregoing Brief for Appellants by mailing in duly addressed envelopes, with first class postage prepaid (airmail where necessary), to the following attorneys for appellees:

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